

## **REMARKS**

### **Status of Claims**

Claims 1, 5-14, and 21-29 are pending in the application.

Claims 1, 5-14, and 21-29 are under final rejection.

Amendments are made herein to claims 9, 13, 25, and 29 which are considered purely cosmetic. No new matter is introduced.

As an initial matter, Applicants appreciate the Examiner's acknowledgement that the instant claims are novel over the disclosures of U.S. Patent No. 5,800,816 to Brieva et al., U.S. Patent No. 6,372,202 to Simon et al., and U.S. Patent No. 6,511,672 to Tan et al.

### **Claim Rejections**

The Examiner has raised a new ground of rejection in the August 8, 2007 Office Action. Specifically, the Examiner contends that claims 1, 5-10, 13, 14, 21-26, and 29 are unpatentable under 35 U.S.C. §103 over U.S. Patent No. 6,511,672 ("Tan"), and claims 11-12 and 27-28 are unpatentable under 35 U.S.C. § 103 over Tan in view of Brieva.

Applicants respectfully request reconsideration of these rejections for at least the reason that, contrary to the Examiner's assertion, Tan does not disclose "a pearlescent component comprising a bismuth oxychloride-containing pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade" and "a pigment component that also matches in shade said benchmark shade" as required by the instant claims.

Tan describes a composition comprising a combination of two different platelets: a "first platelet of alumina treated with metal oxide" and a "second platelet treated with a spherical light scattering component" [col. 3, lines 31-34]; and states that the composition may further comprise an "interference pigment" [col. 4, lines 41-42]. There is no fair reading of Tan under which the first platelet, the second platelet, and the interference pigment can be seen to remotely suggest the presently claimed subject matter, as discussed below.

**Tan's "first platelet"**

Tan's "first platelet" is an "alumina-based pigment" of "alumina treated with metal oxide" [col. 3, lines 31-32 and 41-43]. Tan explicitly states that the first platelet **"does not match skin tone."** [col. 3, lines 40-45]. Accordingly, Tan's first platelet does not constitute "a pigment component that also matches in shade said benchmark shade" as required by the present claims.

Tan states that it is the **combination** of the first and second platelets that is said to "resemble the natural tone of the skin" [col. 3, lines 60-61]. However, the combination of the first platelet and second platelet is not "a pearlescent component comprising a bismuth oxychloride-containing pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade" because the platelets are not "bonded" to one another. Rather, it is clear from Tan that the first and second platelets are merely "blended" together [col. 3, lines 6-10; col. 6, lines 50-52; col. 8, lines 545-8]. There is no reasonable construction of the term "bonded" which would embrace a simple physical admixture of two components.

Nevertheless, the Examiner contends that "the composition disclosed by Tan et al comprises a colored pigment i.e. alumina platelet treated with iron-oxide and bismuth oxychloride, and thus will contain a colored pigment bonded to bismuth oxychloride, i.e. alumina platelet will be in close contact with bismuth oxychloride" (emphasis added) [OA, at p. 5]. While it is true that the Office affords claim terms "their broadest reasonable interpretation" during patent examination (MPEP § 2111), such interpretation must be consistent with the "plain meaning" of the term to "a person of ordinary skill in the art in question at the time of the invention" (MPEP § 2111.1). Applicants submit that the Examiner's construction of "bonded" as encompassing two platelets merely being in "close proximity" defies the plain meaning of the term "bonded," especially as that term is understood by those skilled in the chemical or cosmetic arts. A mixture of salt and pepper puts each in "close proximity" to the other, but clearly would not be viewed as forming a bond between the salt and pepper particles.

Applicants submit that the first platelet of Tan is wholly irrelevant to the present claims because it is neither "a pigment component that also matches in shade said benchmark shade" nor is it "a pearlescent component comprising a bismuth oxychloride-containing

pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade,” for at least the reasons discussed above. The Examiner appears to be ignoring these clear contradistinctions between Tan’s compositions and the instantly claimed compositions which require “a pigment component that also matches in shade said benchmark shade.” If anything, Tan **teaches away** from the instant claims because the first platelet is said not to match skin tone, nor is it bonded to a pearlescent component. Therefore Examiner’s statement that “the first platelet alumina is matched in shade with a natural skin tone” is obviously incorrect, insofar as Tan says that it “**does not match skin tone**” [col. 3, line 44].

### **Tan’s “second platelet”**

The “second platelet” of Tan is said to be “for example, mica, bismuth oxychloride, sericite, alumina, aluminum, copper, bronze, silver or silica” [col. 4, lines 20-22] which can be “treated with a spherical light scattering component” [col. 3, lines 31-34]. While the “second platelet” may be, among other things, bismuth oxychloride, it does not comprise “a pearlescent component comprising a bismuth oxychloride-containing pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade.” First, the second platelet is “coated” with (not bonded to) a “spherical light scattering component” (not a colorant). Second, nowhere in Tan is it said that the second platelet “matches in shade a natural skin tone benchmark shade.” In fact, one skilled in the art would clearly understand that the **second platelet does not match skin tone** because Tan repeatedly states that it is only the combination (“blend”) of the first and second platelets that is said to “resemble the natural tone of the skin” [col. 3, lines 60-61]. For example, Tan states that “Together, the two different platelets form the mosaic which gently reflects light and matches the natural color of the skin” [col. 3, lines 34-36]. Similarly, Tan states that while “[e]ach individual platelet is known . . . they each by themselves have drawbacks when used in traditional makeup formulations intended for daily use because they are not suitable” [col. 3, lines 34-38] and notably, with respect to the second platelet, it is said that they are “shimmery or metallic looking, and therefore, are not typically selected for use in a natural looking makeup of foundation” [col. 3, lines 47-50]. Applicants fail to find any teaching in Tan that the second platelet is matched to skin tone. Because the second platelet is not matched to skin tone, nor bonded to a colorant, Applicants submit that it too has no relevance to the instant claims.

**Tan's "interference pigments"**

Tan states that in "one embodiment, the composition also comprises a standard interference pigment" [col. 4, lines 40-41]. The interference pigments are not said to match skin tone. To the contrary, Tan states that they are "not suitable alone in a makeup product designed to resemble the natural skin tone" [col. 4, lines 56-59]. Rather, Tan states that "[p]referably, interference pigments of different colors or types are combined in the present invention to blend an appropriate shade or intensity of color to match the natural skin tone" [col. 4, line 66- col. 5, line 2]. Thus, the interference pigments of Tan are neither "a pearlescent component comprising a bismuth oxychloride-containing pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade" nor can they reasonably be said to be "a pigment component that also matches in shade said benchmark shade" as required by the instant claims. Applicants fail to see the relevance of Tan's interference pigments to the present invention.

In sum, Tan discloses a first platelet, a second platelet, and an interference pigment which individually **do not match natural skin tone**, but rather must be combined to achieve such an effect. Tan is very clear on this point, stating that it is "the overall net effect of the blended mosaic of pigments and platelets . . . which matches the natural skin tone" [col. 5, lines 44-48]. Moreover, Tan does not teach or suggest "a pearlescent component comprising a bismuth oxychloride-containing pearlescent ingredient bonded to a colorant, wherein said pearlescent component matches in shade a natural skin tone benchmark shade," but rather clearly teaches away from such a pearlescent component matched to natural skin tone.

The Examiner appears to be ignoring the express language of the claims. For example, the Examiner states that "[o]ne of ordinary skill in the art would have been motivated to employ bismuth oxychloride as second platelet with reasonable expectation of success of obtaining a composition that matches the natural color of the skin on **blending** with the first platelet because Tan teaches that the two platelets **together** which include first platelet and second platelet form the mosaic which gently reflects light and matches the natural color of the skin." (emphasis added) [OA at p. 4]. Thus, the Examiner appears to recognize that the components of Tan individually do not match skin tone but rather must be blended together to achieve this effect. That situation is very different from what is recited in the present claims.

For example, while a red colorant and a yellow colorant may be blended together to create the color orange, that does not imply that, individually, the red and yellow colorants are orange. Applicants submit that Tan simply does not teach or suggest separately shade matching either the first platelet, the second platelet, or the interference pigment and is therefore deficient for at least that reason.

In view of the foregoing, Applicants submit that independent claims 1 and 14 fully distinguish over Tan and respectfully request reconsideration of all rejections. The rejection of claims 11-12 and 27-28 under 35 U.S.C. § 103 as obvious over Tan in view of Brieva are similarly deficient for at least the same reasons. However, Applicants reserve the right to address the particulars of this rejection, if necessary, in the future.

### CONCLUSION

Applicants respectfully submit that the instant application is in condition for allowance. Entry of the amendments and an action passing this case to issue is therefore respectfully requested. In the event that a telephone conference would facilitate examination of this application in any way, the Examiner is invited to contact the undersigned at the number provided.

Respectfully submitted,

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